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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1207

JIMMIE DANE BURKE
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

On Petition For A Writ Of Certiorari
To United States Court of Appeals
Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.

JIMMIE DANE BURKE

VERSUS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW:

The only written opinion in the Courts below was the opinion of the United States Court of Appeals for the Fifth Circuit dated September 23, 1968. Since re-hearing has been denied less than 30 days prior to the filing of this petition for Writ of Certiorari, it does not appear that the opinion of the Court of Appeals has been published or officially reported, except in the printed copy of opinion provided by the Court of Appeals under Docket No. 24957. A copy of this opinion is included herein as Appendix (A).

STATEMENT OF THE GROUNDS OF WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion of the Fifth Circuit Court of Appeals is dated September 23, 1968, and re-hearing was denied on February 26, 1969.

The jurisdiction of this Court is invoked under the provisions of Rule 19 of the United States Supreme Court and Title 28, U.S.C.A., Section 1254, providing in part:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTION PRESENTED FOR REVIEW

The sole question involved here is whether a conviction for the violation of 18 U.S.C.A., Section 111, involving an alleged assault upon a Federal officer, requires knowledge on the part of the accused of the federal identity of the victim.

Expressed in the terms and circumstances of this case, the sole issue here is whether the trial court was correct in charging the jury that it was not necessary that Jimmie Dane Burke have knowledge that this was a federal officer in order for Burke to be guilty of violating the statute (18 U.S.C.A. 111) making it a crime to commit an assault upon a federal officer.

STATUTES INVOLVED

1. Title 18, U.S.C.A., Section 111
2. Title 18, U.S.C.A. Section 1114

(See appendix (d) and (e). . .)

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

This is a criminal prosecution, resulting from an alleged violation of U.S.C.A. 18:111.

The action arises out of an incident which occurred in Bogalusa, Louisiana on April 9, 1965, when it is charged that:

> "JIMMIE DANE BURKE did forceably assault, resist, oppose, impede, intimidate and interfere with ROBERT LOUIS WERTMAN, an officer of the Federal Bureau of Investigation of the Department of Justice, while the said ROBERT LOUIS WERTMAN was engaged in the performance of his official duties; in violation of Title 18, United States Code, Section 111."

A Grand Jury indictment was returned, containing the above charge, and on May 5, 1965 a plea of not guilty was entered. On May 2, 1966, the trial began, and on May 3, 1966, after the jury informed the Court that it was hopelessly deadlocked, a mis-trial was ordered. Subsequently, on September 19,1966, the case was again brought up for trial, and on September 20, 1966 the jury returned a verdict of guilty as charged. On January 17, 1967, sentence was pronounced, and the defendant was committed to the custody of the Attorney General for imprisonment for a period of one year, with the Court recommending early parole. A notice of appeal on behalf of the defendant was filed January 18, 1967, and the appeal was subsequently perfected in the United States Court of Appeals for the Fifth Circuit.

By opinion dated September 23, 1968, the Court of Appeals affirmed the District Court. Re-hearing was applied for,

and denied February 26, 1969. A stay of mandate was obtained through and including March 28, 1969.

Regarding the factual background of the case, it appears that Special Agent Wertman of the F.B.I. was in the process of observing and photographing activities in the City of Bogalusa, Louisiana on April 9, 1965. A disturbance took place involving the defendant and some news photographers who had persisted in taking the defendant's picture. Agent Wertman proceeded to adjust his camera, focusing it upon the defendant. There are some conflicts in the testimony as to what took place thereafter. Agent Wertman recalled someone saying "don't take my picture". (Page 34 of Multilith record). Burke apparently jumped or ran toward Agent Wertman. Here again there is conflict in the testimony, with Agent Wertman and Agent Sass testifying that someone shouted "he's an F.B.I. agent", but at least one other officer, Trooper John Short, did not hear any such warning (Page 78). Agent Wertman at the time of this incident had no identification visible to the public; he had on a business suit, without any badge (Page 40-41). Burke struck at Wertman or Wertman's camera, and according to Wertman, hit him.

The Court instructed the jury that the law does not require that the defendant have knowledge that the person who is assaulted is a Federal Officer. A charge conference was held by the Court, during which this phase of the law was explored in detail, and, relying upon recent Court of Appeals decisions, the Court charged that knowledge is not essential, to which, of course, defendant's counsel objected. This sole legal issue permeated the entire trial, and it is the sole question at issue here.

Title 18, U.S.C.A., Section 3231 provides the basis for Federal jurisdiction in the Court of First Instance.

ARGUMENT

MAY IT PLEASE THE COURT:

The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same question. Also, this decision involves an important question of Federal law which has not been, but should be settled by the United States Supreme Court. Additionally, it is respectfully submitted that the decision of the Court of Appeals is in conflict with the principle stated by this Court in the case of Morissette v. United States, 342 U.S. 246, 72 Supreme Court Reporter 240 (1952).

As pointed out by the United States Court of Appeals for the District of Columbia Circuit, in Mitchell v. United States, 394 F. 2d 767 (1968):

> "Although several courts have held that knowledge of the victim's federal employment is an element of a section 111 offense, there is a discernible trend of decisions to the contrary" (394 F. 2d 767, 772)

In footnote, the Court in the Mitchell case pointed out the following decisions as being among those holding that knowledge is an element:

> "Walker v. United States, 93 F. 2d 792 (8th Cir. 1938); Sparks v. United States, 90 F. 2d 61 (6th Cir. 1937); Chiaravalloti v. United States, 60 F. 2d 192 (7th Cir. 1932)"

The following decisions are among those to the contrary:

> "United States v. Wallace, 368 F. 2d 537 (4th Cir., 1966), cert. denied 386 U.S. 976, 87 S. Ct. 1169, 18 L. Ed. 2d

136 (1967); United States v. Lombardozzi, 335 F. 2d 414 (2d Cir.), cert. denied, 379 U.S. 914, 85 S. Ct. 261, 13 L. Ed. 2d 185 (1964); Bennett v. United States, 285 F. 2d 567 (5th Cr. 1960), cert. denied, 366 U.S. 911, 81 S. Ct. 1087, 6 L. Ed. 2d 236 (1961)"

The Mitchell case involved the offense of stealing property belonging to the District of Columbia, but the Court went very thoroughly into the question of Sienter in analogous situations. The following language, although provided by the Court in connection with the requirement of knowledge on the charge of stealing, is pertinent to the question involved here:

"On the other hand, there are several reasons for arguing that knowledge of ownership by the District of Columbia is a necessary element in a §22-2206 offense. First, one may point to the statutory language specifying "property of the District of Columbia" and apply the reasoning of the Supreme Court in Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952):

> The spirit of the doctrine which denies to the federal judiciary power to create crims forthrightly (see United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 3 L. Ed. 259; United States v. Gooding, 25 U.S. (12 Wheat.) 460, 6 L. Ed. 693) admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.

342 U.S. at 263, 72 S. Ct. at 249.

(9) This statement suggest that the judiciary should be hesitant to depart from a literal reading of a criminal

> statute; as there is no strong reason for omitting the *scienter,* the statutory language indicates that it is an element of a § 22-2206 offense. Second, the penalties provided for petit larceny and "petit" embezzlement are relatively minor. It is quite possible that because of the greater vulnerability of low-valued government property (street lights,refuse containers, park benches, office supplies, etc.), Congress intended to create a greater deterrent to this type of theft and embezzlement, and, therefore, enacted § 22-2206 with more severe penalties. Since § 22-2206 would be a greater deterrent only if the potential wrongdoers were aware that the property they were intending to steal belonged to the District of Columbia, the statute would have its intended effect only if construed to require *scienter.* "

A very thorough discussion of the judicial background of interpretation of 18:111 appears in Judge Godbold's dissent in Pipes v. United States, 399 F. 2d 471 (5th Circuit, 1968). As pointed out by Judge Godbold:

> "It misses the mark to say we would be rewriting the statute by requiring knowledge and thereby changing its intent and meaning. Requiring knowledge when the statute does not so state is exactly what this and many other courts have been, and are doing, for this and numerous other federal statutes. Further, the congressional intent is assumed, not demonstrated," (399 F. 2d 471, 476)

His dissent goes on to outline like statutes in which knowledge is required although not referred to in the statute.

Going on to MORISSETTE, the defendant there went upon government property and removed three tons of empty bomb casings. When arrested and charged with violating 18

U.S.C.A. 641, Morrissette maintained that he thought this property was abandoned. The Trial Court took the position that criminal intent was presumed, and charged the jury accordingly. Morissette was convicted, and on appeal through the United States Court of Appeals for the 6th Circuit, his conviction was sustained. The United States Supreme Court granted certiorari,and in a thoroughly documented opinion concluded:

> "It is alike the general rule of law, in the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention . . ." (72 S. Ct. 240, 255)
>
> "But knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, thought not necessarily the law, that made the taking a conversion." (72 S. Ct. 240, 254)

In exploring the background of the principle of intent, and of the requirement of knowledge of the facts which make the act punishable, the Court provided the following history:

> "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle buy merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The

> unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of difference offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," *"criminal intent"*, "malice aforethought," *"guilty knowledge,"* "fraudulent intent", "wilfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthly in mind from conviction of infamous common-law crimes." (Emphasis added)

Obviously criminal intention is required. This is unquestioned, and this essential element was recognized by the Trial Court in the instant case as follows:

> "The essential elements required to be proved in order to establish the offense charged in the indictment are, first, the act or acts of forcibly assaulting an agent of the Federal Bureau of Investigation while the agent was engaged in the performance of his official duties as charged; and secondly, *doing such act or acts willfully, which means with bad purposes, to disregard the law."* (Multilith Record, page 129)

However, after charging the jury that the act must be done "with bad purposes, to disregard the law", the Trial Court negated or contradicted this correct statement of law by charging the jury, in effect, that knowledge of the facts making this a crime was not necessary in order to find guilt. As shown by the preceding quotation from MORISSETTE, criminal intent

is generally analogous to guilty knowledge. The analogous nature of these words, or concepts, is further pointed out at 72 S. Ct. 250, where the Court noted that Congress "has seen fit to prescribe that an evil state of mind, described variously in one or more terms as "intentional, willful, knowing, fraudulent or maliciou", will make criminal an otherwise indifferent act or increase the degree of the offence or its punishment". Obviously we must have criminal intent in the instant case in order to have guilt. If intent is required, then "knowing" or knowledge, which is comparable to intent or part of it, is also required, and the Trial Court, in requiring that the act be done willfully, but in going on to eliminate the requirement that it be done with knowledge, is causing it's charge or instruction to contradict itself.

In MORISSETTE, the Court discussed what it referred to as "public welfare offenses", where "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation" (72 S. Ct. 240, 246). The Court is careful to point out that the abolition of intent is not to be presumed:

> "Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clea. expression, intends in any instance to do so." (Footnote 14, 72 S. Ct. 240, 245)

Continuing, the Court stated:

> "The Government asks us by a feat of construction radically to change the wrights and balances in the scales

> of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative." (72 S. Ct. 240, 249)

In the instant case the trial court did just what was prohibited in MORRISSETTE. The following quotation from MORISSETTE is pertinent:

> "As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court (b) as a presumption of law, apparently conclusive (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error." (72 S. Ct. 240, at page 255)

The Trial Court's charge was predicated upon the isolated act of attacking *someone* rather than upon all of the circumstances.

Morissette did not know that this was government property; he thought it was abandoned; he had no intent to steal government property. Burke did not know that this was a government agent; he thought this was a private individual who persisted in taking his picture; he had no intent to assault a government agent.

The severe penalty allowed by this statute (18:111) is obviously justified only because of the official character and purposes of the person assaulted or impeded. Without this

official character you have an offense which is punishable under the laws of Louisiana and presumably the laws of every city in Louisiana. Therefore, the strenuous penalty imposed by the Federal Statute should only be applicable where the offender has knowledge of the facts which constitute this crime. If he has this mens rea, the intent to violate this law, then the penalty provided by the law has meaning and can logically be justified; if he does not have this guilty intent or knowledge, then the penalty is out of all proportion to the offense.

It is submitted that the Congress would not have authorized such a severe penalty without intending that it's application would be limited to instances of persons who knowingly commit the prohibited act.

In conclusion, it is submitted that the question involved here is ready for review by this Honorable Court. Not only are there conflicting decisions by the Courts of Appeals, but we have a very important question of Federal law which should be decided by this Court. Summarizing the analogy to MORISSETTE, if Morissette did not have criminal intent because of his lack of knowledge of the facts involved, then Burke did not have criminal intent if he had no knowledge of the facts involved, and just as this Court required that the jury be so charged in MORISSETTE, they should have been so charged in this case. As pointed out by Mr. Justice Jackson in MORISSETTE, had the jury convicted on proper instructions "it would be the end of the matter". Correspondingly, had they refused to brand Burke as a criminal, "that too would have been the end of the matter."

An important and evidently a frequently recurring question is involved here. We respectfully submit that this Court should review it.

Respectfully submitted,

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(Admitted to practice before the United States Supreme Court)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition have been served on Harry Connick, Assistant U.S. Attorney, St. Louis St., New Orleans, La. this day of March, 1969.

Delos R. Johnson, Jr.

John N. Gallaspy

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24957

JIMMIE DANE BURKE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(September 23, 1968)

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge.

TUTTLE, Circuit Judge: This appeal presents clearly and concisely the question whether a conviction for the violation of 18 U.S.C.A. §111, [1] comports with the law upon proof that the accused wilfully assaulted a federal official included within the definition of Section 111 as being covered by the protection of the act, without either allegation or proof that when so assaulting the accused knew that his victim was a federal agent

[1] Title 18, U.S.C.A. 111, reads in part:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interfers with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisioned not more than three years, or both.

"engaged in or on account of the performance of his official duties."

This appeal raises only this point. There is no dispute but that Jimmie Dane Burke wilfully and intentionally attacked FBI Agent Robert L. Wertman, who was photographing incidents of violence occurring during a civil rights march in Bogalusa, Louisiana. Although there may have been evidence in this trial sufficient to have warranted a jury in finding that Burke actually had knowledge of the identity of Agent Wertman, this is unimportant because at a charge conference and in the actual charge to the jury, the trial court stated that such knowledge is not essential to a conviction, if the jury found that the assault, defined by the court to require wilfulness and intent, actually occurred on an agent of the United States while actually engaged in the performance of his duties.

This case is controlled by the recent decision of this court in the case of *Pipes v. United States*, 5 Cir., F. 2d , , (No. 24965, dec. July 30, 1968). However, in light of the concurring opinion by Judge Godbold in that case it may be appropriate to point out that a case based upon Section 111, as construed by this court, is not submitted to the jury without a charge that the "assault" must be an intentional act wilfully done without legal excuse. The trial court here carefully charged the jury in defining the term "assault":

> "Any intentional and unlawful threat or attempt to commit injury upon the person of another, when coupled with an apparent present ability so to do, and an intentional display of force such as to place the victim in responsible apprehension of immediate bodily harm constitutes an assault. An assault may be committed without actually touching, striking, or committing bodily harm to another."

"Any intentional use of force upon the person of another, which results in unlawful touching of another, constitutes a battery.

"Unlawfully, as used in this instruction, means either contrary to law or without legal justification.

"Thus a person who, in fact, has the present ability to inflict bodily harm upon another, and wilfully threatens or attempts to inflict bodily harm upon such person, may be found guilty of forcibly assaulting such person.

"The essential elements required to be proved in order to establish the offense charged in the (120) indictment are, first, the act or acts of forcibly assaulting an agent of the Federal Bureau of Investigation while the agent was engaged in the performance of his official duties as charged; and secondly, doing such act or acts willfully, which means with bad purposes, to disregard the law."

This court first announced the rule relied on in *Pipes*, supra, in *Bennett v. United States*, 5 Cir., 1960, 285 F. 2d 567. The Court of Appeals for the Fourth Circuit is of the same view, as announced in *United States v. Wallace*, 4 Cir., 1966, 368 F. 2d 537, as is also the Court of Appeals for the Second Circuit, which, recognizing a split in the circuits, said in *United States v. Lombardozzi*, 2 Cir., 1964, 335 F. 2d 414:

"The reasoning in McNabb [*McNabb v. United States*, 6 Cir., 1941, 123 F. 2d 848, the case relied upon by us in *Bennett*, supra] and Bennett is far more persuasive as to the proper construction to be placed upon Section 111 than those cases which write the element of scienter into a statute which does not contain this requirement." 335 F. 2d at 416.

It should be noted that in *Bennett, Pipes* and in this case, the gist of the offense was a "forcible assault" on an officer, an act which was a common law crime. We do not here deal with the nature of the charge that would be required by a court in order adequately to present to a jury a case in which proof of the indictment related only to one of the other prohibited acts "forcibly resists ... opposes, impedes, intimidates, or interferes with any person...while engaged in or on account of the performance of his official duties." Since it is clear that there must be a wilful and intentional forcible course of conduct proven in order to satisfy the requirements of the statute, it may well be that as to some of the other forbidden acts it would be necessary for the court to charge the jury in terms that would make it essential to show that the accused person knew of the identity of the government official as such in order for him to be guilty of wilfully violating the statute. For a discussion of this view, see *United States v. Wallace,* supra, where the Court of Appeals for the Fourth Circuit said:

> "Insofar as the statute proscribes resistance, opposition, and intimidation of a federal official or interference with his performance of his official duties, an intentional and unlawful invation of the rights of the victims is certainly contemplated, and the statute does not proscribe reasonable force employed in a justifiable belief that it is exerted in self-defense. So long as the conduct is intended as an unlawful interference with a victim, who, in fact, is a federal official engaged in his official duties, the conduct is within the reach of Section 111."*United States v. Wallace,*4 Cir., 368 F.2d 537, at 538.

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24957

D. C. Docket No. CR 29970-D

JIMMIE DANE BURKE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

September 23, 1968

Issued as Mandate: Oct. 30, 1968

APPENDIX C

[952] (1967 Docket)-Tuttle

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 24,957

JIMMIE DANE BURKE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(FEBRUARY 26, 1969)

ON PETITION FOR REHEARING

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX D

The two statutes which this case involves are set out on this page and the following page.

TITLE 18, UNITED STATES CODE ANNOTATED

§ 111 *Assaulting, resisting, or impeding certain officers or employees.*

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000.00 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(Found in Volume 18, United States Code Annotated, at page 11)

APPENDIX E

§ 1114 *Protection of officers and employees of the United States.*

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any post-office inspector, any officer or employee of the secret service or of the Bureau of Narcotics, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture of the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the

United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare designated by the Secretary of Health, Education and Welfare to conduct investigations or inspections under the Federal Food, Drug, and Cosmetic Act while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title. June 25, 1948, c. 645, 62 Stat. 756; May 24, 1949, c. 139, §24, 63 Stat. 93; Oct. 31, 1951, c. 655 §28, 65 Stat. 721; June 27, 1952, c. 477, Title IV. §402(c), 66 Stat. 276; July 29, 1958, Pub. L. 85-568, Title III, §304(d), 72 Stat. 434; July 2, 1962, Pub. L. 87-518, § 10, 76 Stat. 132; Aug. 27, 1964, Pub. L. 88-493, §3, 78 Stat. 610; July 15, 1965, Pub. L. 89-74, § 8(b), 79 Stat. 234.

(Found in Volume 18, United States Code Annotated, at page 37)

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1207

JIMMY DANE BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 400 F. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968. A petition for rehearing was denied on February 26, 1969. The petition for a writ of certiorari was filed on March 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in a prosecution for assault on a federal officer, 18 U.S.C. 111, the government must prove that the defendant knew the victim was a federal officer engaged in the performance of his duties.

STATEMENT

In the United States District Court for the Eastern District of Louisiana petitioner was convicted of assaulting a federal officer, in violation of 18 U.S.C. 111. On January 17, 1967, he was sentenced to imprisonment for one year. The court of appeals affirmed (Pet. App. A, 400 F. 2d 866).

The evidence showed that on the morning of April 9, 1965, a civil rights demonstration march was conducted on Columbia Road in Bogalusa, Louisiana (R. 25). A substantial crowd gathered along the sidewalks to observe the demonstration. A number of local and state police were on hand, as were approximately twenty FBI agents (R. 67). Among the agents was Robert L. Wertman, who was equipped with a camera and assigned to take photographs of any incidents which might involve a violation of federal law (R. 23). At the intersection of Third Street and Columbia Road three men, including petitioner, broke from the crowd of onlookers and attacked some magazine photographers (R. 59). Agent Wertman, clothed in ordinary dress, went to the site of the disturbance and began to take pictures. After petitioner had been momentarily restrained by local police from assaulting the magazine photographers, he rushed toward

Wertman and attacked him. One blow struck Wertman on his shoulder and neck (R. 36-37). Petitioner was then restrained and arrested by another FBI agent. There was evidence that someone had shouted prior to the attack on Wertman that "He's an F.B.I. agent" (R. 38-39). Petitioner testified that he heard no shouting, and did not know Wertman's federal status until after his arrest (R. 81-82). The court instructed the jury that knowledge of the federal identity of the victim was not an element of the offense (R. 130).

ARGUMENT

Petitioner has demonstrated no sound reason for re-examining the recent decisions in *Pipes* v. *United States*, 399 F. 2d 471 (C.A. 5), certiorari denied, March 24, 1969 (No. 1327 Misc., this Term); *McEwen* v. *United States*, 390 F. 2d 47 (C.A. 9), certiorari denied, 392 U.S. 940; *United States* v. *Heliczer*, 373 F. 2d 241 (C.A. 2), certiorari denied, 388 U.S. 917; *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; and *United States* v. *Montanaro*, 362 F. 2d 527 (C.A. 2), certiorari denied, 385 U.S. 920. See also *United States* v. *Lombardozzi*, 335 F. 2d 414 (C.A. 2), certiorari denied, 379 U.S. 914; and *Bennett* v. *United States*, 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911. These cases all agree that in a prosecution under 18 U.S.C. 111 the government need not prove that the accused knew the person he assaulted was a federal agent. In our brief opposing certiorari in *Wallace* (No. 1023 Misc., O.T. 1966) and *Montenaro* (No.

460, O.T. 1966) we set forth the reasons why we believe that the decisions holding such knowledge not an element of the offense correctly construe 18 U.S.C. 111, as amended in 1948. In brief, we showed that Congress did not use such words as "knowingly" or "intentionally" to write a requirement of scienter into the statute, and that Congress "merely sought to provide a federal forum for the trial of cases involving various offenses against federal officers in the performance of official duties." *United States* v. *Lombardozzi*, *supra*, 335 F. 2d at 416. The cases cited by petitioner holding that knowledge is an element all preceded the 1948 revision to 18 U.S.C. 111. Following the revision, the Fifth Circuit did continue to hold that scienter was an element of the offense, *Hargett* v. *United States*, 183 F. 2d 859, 864-865; *Hall* v. *United States*, 235 F. 2d 248. However, in its most recent decisions (*Bennett* and *Pipes*, *supra*, and petitioner's case) that court has indicated that it now accepts the generally prevailing view that knowledge of the federal character of an officer is not a necessary element of the offense.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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